IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as Business Agent, Organizer, and Vice President, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 61, sometimes known as International Bartenders & Beverage Dispensers, Local No. 61;

INTERNATIONAL UNION OPERATING ENGINEERS, Local No. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All affiliated with the American Federation of Labor,
Petitioners and Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

BRIEF OF RESPONDENT WISCONSIN EMLOYMENT RELATIONS BOARD OPPOSING GRANTING WRIT OF CERTIORARI

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BRIEF OF RESPONDENT WISCONSIN EMLOYMENT RELATIONS BOARD OPPOSING GRANTING WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW

The petition for writ of certiorari seeks to review a decision of the Supreme Court of Wisconsin, 236 Wis. 329,

294 N. W. 632, rendered November 8, 1940, and a decision of said court denying motion for rehearing, 236 Wis. 329, 295 N. W. 634. The decision denying motion for rehearing was rendered January 7, 1941 (R 47, 68).[1]

II.

NATURE OF THE CASE

The decisions above referred to affirmed the judgment of the Circuit Court of Milwaukee County, dated May 14, 1940, sustaining, confirming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940 (C 47-51 inc.).

The Plankinton House Company (hereinafter referred to as the Company) is a corporation which operated the Plankinton House and Kilbourn Hotel, both located in the City of Milwaukee (C 251). On or about the 20th day of November, 1939, the Company filed complaint with the Wisconsin Employment Relations Board (hereinafter referred to as the Board) charging the unions, the officers and agents thereof (petitioners for certiorari herein) and the members thereof with unfair labor practices, towit, violation of section 111.06 (2) (a) (e) (f) (g) (h) and (j) and

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[1] The paging of the record is confusing. The record consists of (1) the case used in the Supreme Court of this state, (2) the supplemental case, and (3) the proceedings in the Supreme Court. These later proceedings are numbered 42 to 72 inclusive. It will simplify the citation to refer to such pages as Record (R) and when reference is made to the case and supplemental case to refer to them respectively as C and SC.

Certified copies of original exhibits referred to in the case are likewise returned and filed as part of the record.

sec. 111.04 of the Employment Peace Act[1] (C 8, 64-69 inclusive).

The unions, their officers and agents answered in substance denying such unfair labor practices and raising a number of constitutional issues with respect to the validity of Ch. 57, Laws of 1939 (The Employment Peace Act) (C 8-9, 70-80 inclusive).

After due notice of hearing an extensive hearing was held before the full Board (C 9, 81-250 inclusive).

On February 15, 1940 the Board made its findings of fact, conclusions of law and order (C 251-262 inclusive). The order required the involved unions (petitioners for certiorari) the officers, members, agents, successors and assigns of each, to

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union

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[1]The Act is printed as Appendix "B" to the petition for writ of certiorari and the brief filed in support thereof, pp. 59-77 inclusive.

has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith." (C 261)

The petitioners for certiorari herein then petitioned the Circuit Court for Milwaukee County for a review of the order of the Board (C 2-6 inclusive) pursuant to the provisions of sec. 111.07 (8) of the Employment Peace Act. The Board answered and cross petitioned for enforcement of its order (C 6-11 inclusive). The Circuit Court, on May 14, 1940, entered judgment sustaining, confirming and enforcing the order of the Board (C 47-51 inclusive).

The petitioners for certiorari in this court appealed from that judgment to the Supreme Court of the State of Wisconsin and that court, in the decisions above referred to (p. 1 of this brief) affirmed the judgment of the Circuit Court.

III.

THE FACTS

A. The collective bargaining agreement with the unions.

The unions involved herein are voluntary, unincorporated associations, each affiliated with the American Federation of Labor (C 251). On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with said unions, which contract covered wages, hours and working conditions governing the employees of the Plankinton House and the Kilbourn Hotel, the contract providing as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as they were employed by the Company (Finding 5 of the Board, C 252).

The contract further provided that it was to continue for a period of one year, ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that said party decided to terminate the agreement at the end of such contract year. It was further provided that either party might notify the other party in writing within thirty days of the date of termination of such contract that it desired the contract continued for an additional year, and that such party desired to negotiate hours, wages and working conditions for the following contract year. If such notice were sent, the contract was to continue in force and

the terms agreed upon by virtue of such subsequent negotiations were to be retroactive from the date of the commencement of any such year. If the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year, the difference was to be submitted to arbitration in accordance with the procedure prescribed by the contract. Such arbitration was to be final and binding on both parties, but if either party were dissatisfied with the arbitration award, the right to strike or lock-c was reserved to the union and the company respectively (Finding 6 of the board, C. 253).

B. The Negotiations

The Plankinton House Company had notified the unions that it desired its contract to continue for another year and that it desired to negotiate hours, wages and working conditions for such additional contract year (Finding 8 of the Board, C 254, Ex. 3). The unions had given similar notice to the Hotel Company (Finding 7 of the Board, C 253, Ex. 2, 16). The representatives of the interested parties met on June 27, 1939 to negotiate (Ex. 54). Other hotels besides those conducted by the Plankinton House Company were involved in the negotiations. The representatives of the hotels felt that with the number of the interests that were involved in the transaction and so that there might be no misunderstanding as to any of the discussion that took place, a court reporter should be present. Mr. Goldberg, attorney for the unions, refused to negotiate with a court reporter present. Nothing much seems to have been ac-

complished at the aforesaid meeting other than to suggest that the parties submit their desired changes in writing. This was done.

The unions presented their proposed contract revisions (Exhibit 5). The proposals were not unreasonable and were such as to form a fair basis for negotiation. Thereafter, the Plankinton House Company submitted in writing its suggested contract revisions. These revisions were submitted about July 1, 1939 (Finding 9 of the Board, C 254, Ex. 6). By comparison of Exhibit 6 and Exhibit 1, it will be seen that the changes desired by the Plankinton House Company were substantially as follows:

1. That the article relating to exclusion of employees from membership in the union be enlarged to include others who were in close relationship to the management or had some supervisory duties.

2. That the arbitration provision be changed so as to eliminate the provision that either party should have the right to a strike or a lockout in the event such party was dissatisfied with the arbitration award.

3. That the closed shop provision of the contract be eliminated.

4. That the seniority clause be revised to make it more flexible and workable.

5. That there be a classification of hotels in the city for the purpose of wage scale, such classification, however, not to affect present wages.

All of these requests were reasonable and legitimate subjects of negotiation.

The response to the involved hotels' suggested changes

was a letter dated July 11, 1939 (Exhibit 7) in which it was stated that the counter-proposals embodied therein were highly unacceptable and unsatisfactory. The letter was in the following tenor:

> "* * * We regret to note that the tenor of such revisions evinces an anti-labor attitude on the part of your respective clients, and we can only say that in all probability this is a natural consequent of the recent anti-labor laws passed by the Wisconsin Legislature. * * *"

The letter further states:

> "In view of the seeming impossibility to get together Local 122, Hotel & Restaurant Employees International Alliance of America, in accordance with Articles I and III, which provide there shall be no strike or lockout arising out of failure to negotiate a contract unless arbitration be had, the said Local 122 herewith demands arbitration affecting its contract, and herewith designates Phil L. Valley and I. E. Goldberg as its representatives on said arbitration board."

(Note the very thinly veiled regret that it is necessary to arbitrate before striking.) The letter also enclosed a proposed letter and the attorneys representing the involved unions stated that they proposed to send said letter to the National Letter Carriers Association unless a contract were executed by Saturday, July 15, 1939. The letter concludes:

> "We hope that after due consideration your clients will think better of their position, and will enter into a contract with the unions, and not make necessary arbitration or the sending of the letter to the convention committee of the Letter Carriers' Association."

The sample letter to be sent to the convention committee on July 15 (quite regardless of arbitration) accuses the involved hotels (with honest differences to arbitrate) as having taken an arbitrary anti-union attitude, blacklists the involved hotels, and requests the convention committee to inform all its locals throughout the country to advise their delegates to refrain from making reservations at such hotels and also that if they have made reservations to cancel the same.

C. The Arbitration Proceedings

The points of difference between the involved unions and the involved hotels were submitted to arbitration September 20, 1939 (Exhibit 19), the intervening time apparently having been consumed in endeavoring to agree upon a fifth arbitrator, inability to agree thereon and finally the appointment of Alfred H. Handrich by the Wisconsin Employment Relations Board (Exhibits 8, 19; Finding 10 of the Board, C 254).

The involved hotels submitted their differences with the involved unions to the board of arbitration and in a true spirit of arbitration. The unions did not. Exhibit 19 (the arbitration proceedings) is an exhibit with respect to which we invite the court's most careful consideration. It appears very clearly from the exhibit that the five matters heretofore mentioned which the hotels wanted embodied in a new contract were all matters of vital importance to the involved hotels. The Plankinton Hotel was the only one of the involved hotels that appeared to be making any money

and it was making a very small return upon the capital invested. The Hotel Wisconsin Company had not made any money since 1931 (Exhibit 19, page 51). The result of operations during the preceding year was a net loss of $42,649. The operations for the current year (1939) were resulting in a worse loss than the preceding year. The operations in 1937, which was a very good year for hotels comparatively, resulted in a loss of over $6,000 for the Wisconsin Hotel Company. They had not made a profit for a period of seven or eight years (Exhibit 19, page 52). The company owned two 99 year leases and the present rental payable under those leases was $20,000 a year. The owners of the ground had not received a cent of ground rent since 1933 because there wasn't any money available for that purpose. The company was in default to the extent of approximately $100,000 in taxes (Exhibit 19, page 52).

Mr. Goldberg stated many times that the uniform hotel contract used in Milwaukee was the finest in the country (Exhibit 19, page 54). Granted that to be true, its very fineness presented serious management problems to these hotels. The hotels were far from exhibiting an anti-union or unfair labor attitude in endeavoring to arrive at some solution of their problems.

The article relating to the exclusion of employees from membership in the union to be enlarged to include others who were in close relationship to management and who had supervisory duties, was a most reasonable request. The exclusion of the front office help from the contract at the Plankinton (persons very close to management) involved about 10 people (Exhibit 19, page 62) out of a total of 188 (C 158). At the Medford Hotel, it involved 8 employees out

of 121. The matter of clarifying that provision in the contract also involved honest operations by other hotels under the terms of their contract with the union. This point appears very conclusively (Exhibit 19, page 55 et seq.).

Ordinarily those in close relationship to management and having supervisory duties are not eligible for membership in a union of operation employees. It is difficult for such employees to serve two masters. When nationally organized unions seek to have company dominated unions disestablished, one of the points invariably pointed out to establish company domination is that of membership in the company union of employees who are close to management.

The unions' attitude upon this request was no different from that upon all of the other requests. With respect to every request that the hotels endeavored to seriously arbitrate, the unions' attitude was one of adamant opposition thereto, a complete refusal to even listen to it and a threat to strike if the request were considered and granted by the board of arbitrators. The arbitration was one of arbitrating with a shotgun and with the shotgun pointed at the fifth arbitrator.

There can be no real arbitration under such circumstances. Exhibit 19 is a conclusive argument with respect to the reasonableness of point 2 which the hotel submitted for arbitration, namely, that of an arbitration clause which amounted to something and which would make the arbitration award binding upon the parties. It was calculated to make the arbitration clause amount to something other than waste motion and it was calculated to put the parties in a position where both would have to arbitrate upon the merits rather than by the shotgun process.

Point 3 involved elimination of the closed shop or all-union provision in the contract. The hotels took the position that said clause was not in accordance with the spirit of Ch. 57, Laws of 1939 (the Employment Peace Act) and that they disliked compelling employees to join a union if the employees did not want to do so. This matter finally came down to a point where the involved hotels signified their willingness to having a closed shop provision in the contract provided the employees wanted a closed shop provision and voted therefor at an election to be conducted by the Wisconsin Employment Relations Board. The attitude of the involved hotels was a most reasonable one and in accordance with existing law (Exhibit 19, page 71 et seq.).

The 4th point submitted to arbitration, namely, a requested revision of the seniority clause so as to make it more flexible and workable, was most reasonable. The reasons therefore are stated at page 70 of Exhibit 19. The seniority clause is a most troublesome clause in any union contract with employers. There necessarily has to be some flexibility in it. The seniority rule in state or national service, while a desirable rule, if rigid and unflexible, will often mean that the incompetent and unadaptable are filling jobs that the competent and adaptable should fill. The seniority rule, while undoubtedly desirable in any union contract or in state or national service, does make for round pegs in square holes and without considerable flexibility makes for inefficiency and serious management problems.

The argument for the classification of hotels (the fifth point submitted by the hotels for arbitration) is presented on page 64 of Exhibit 19. No one could say that the request was an unreasonable request and with respect to hotels

operating at losses or upon an extremely small margin of profit, it would seem that the request was a necessary one if the hotels were to survive.

D. The Arbitration Award

On October 30, 1939, the board of arbitration issued its award, the two members appointed by the involved unions dissenting (Exhibit 9). The award in general granted all of the union requests for revision (none of the requests had been opposed by the involved hotels). The only provision granted in the award which had been urged by the hotels was a provision that a closed shop was to be effective only upon the condition that the employees of the respective hotels involved, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75% majority. This provision conformed to the provisions of sec. 111.06 (1) (c) regarding all-union contracts. On November 1st, the Plankinton House Company notified the unions' attorney, Mr. Goldberg, of its acceptance of the arbitration award and that it was ready to enter into a contract in accordance with the provisions thereof (Exhibit 10, Finding 13 of the Board, C 256).

E. The strike and the conduct engaged in during the course thereof

At about 4 o'clock on November 2, 1939, the business manager of Local 122, Phil L. Valley, "pulled" the strike

(C 84, 85) and ordered all employees in every department of the Plankinton House and Kilbourn Hotel to cease work. A picket line of 75 or 80 pickets was thrown about all the entrances to the hotels and the pickets continued to parade before the entrances at the time of the hearing before the board (C 85).

Prior to the calling of the strike, the employees of the Plankinton House Company did not vote by secret ballot to call such strike. This fact was expressly stipulated by the unions' attorneys (Finding 15 of the Board, C 256, 82). The strike was called at a time when the hotel was full of school teachers who were in Milwaukee for the teachers' convention (C 155),—a time calculated to cause just as much harm and injury to the hotel as the unions could cause and to cause as much inconvenience to the public as could be caused, not to mention the fear and intimidation directed at the guests of the hotels.

The picketing was characterized by booing, hissing, sneering and hooting at guests (C 158). The manager of the hotel was spit upon one night (C 158). On at least one occasion the pickets carried clubs in their hands in front of the hotel (C 158). The campaign was characterized by threats of physical violence directed at the employees by spitting upon them and by calling them vile names (C 101, 104, 136, 139, 140, 141, 142, 145, 146, 148).

Numerous inexcusable assaults and batteries occurred and many of them were committed by responsible officers of the union and those actively in charge of the picketing. The pickets by force attempted to prevent the delivery of products and commodities to the hotel and resorted to the secondary boycott. In numerous instances the union pro-

vided counsel and paid the fines of those arrested for assaults. All of the foregoing appear from findings of the board (not challenged) nor are they denied in the record. For convenient reference to the violent and inexcusable conduct and the details connected therewith, we set forth the findings of the board on these matters, as well as citation to the pages of the case and record where the details may be found (Findings of the Board, C 257 et seq.).

> "Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager, notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such students did discontinue work at the Plankinton House, that the union would be forced to stop the employment of university students working at other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122" (Finding 17, C 114-120).

> "On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time, Jack Heisdorf, Vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, Assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined ten dollars and costs, and Heisdorf being fined five dollars and costs, the sentence against Heisdorf being suspended and he was

placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin, and paid McLaughlin's fine" (Finding 19, C 102-104).

"Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted, and fined twenty-five dollars and costs, and the union again provided him with counsel and paid such fine" (Finding 20, C 91, 137).

This was on an occasion when Raasch was attempting to carry salt into the hotel (C 137).

"On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets" (Finding 21, C 139, 140).

Phil L. Valley was the business manager of Local 122. Not only was the delivery prevented but it was stated by Heisdorf, vice-president of the Union (C 85) that the doors might as well be locked and barred because nothing was going to get in or out of the building (C 140).

"On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House" (Finding 22, C 104, 112, 113, 125, 126).

"On November 17, 1939, Paul Zeibell, an employee of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs" (Finding 23; C 132-136).

"On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House" (Finding 24; C 145).

"On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs" (Finding 25, C 149).

Amended finding 26 is as follows: (page 271 of printed case)

"On November 17, 1939, Thomas James, an employe of the Plankinton House was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and said Larry McAllen was thereafter arrested, convicted and fined five dollars and costs" (C 143-144).

"Throughout the strike, the City of Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police officers for the purpose of maintaining order" (Finding 27, C 197)

Other instances of like conduct not adverted to in the board's findings may be found in the record as follows: C 140, 150; 151, 158.

The attorney for the unions endeavored to get the Busi-

ness Institute of Milwaukee, occupying some nine rooms of space in the hotel, to break its lease with the hotel (C 121, 122).

John W. Polcyn, Captain of the Milwaukee Police Department, testified to seven distinct arrests and convictions of pickets at the property of the Plankinton House Company because of violence, crimes and misdemeanors (C 194-196).

About two weeks before December 11, 1939, shingle nails were spread about the parking lot on several occasions and after pickets, ranging to ten in number, were standing near said lot (C 146-147, Exhibit 20).

On November 19th a stench bomb was found in the hotel. The liquid had been generously distributed along about thirty feet of the hallway immediately adjacent to some of the dining rooms (C 156, 157).

On November 26, 1939 the rear elevator window on the main floor was broken by a large stone having been thrown through it (C 157, Exhibits 22 and 23)

On November 11, 1939 after the strike had been in progress for some nine days, the unions' effort to adjust is evidenced by the business manager's letter of November 11th (Exhibit 12) in which demand was made (1) that the Plankinton House Company execute the same supplemental agreement which the 27 major hotels had agreed to and (2) that the hotel give all employees in Local 122 a uniform 10% raise.

On November 28, 1939, the union wrote the Plankinton House Company that under the terms of the contract they could hire no new employees except from the union and that the employees so hired would refuse to work (Exhibit 13).

148 out of 188 former employees had returned to work and were employees of the company at the time of the hearing before the board (C 158).

IV.

QUESTIONS PRESENTED

It is asserted in the petition for the writ of certiorari (p. 2) as follows:

> "The so-called 'Wisconsin Peace Act' sought to repudiate, and does pervert, the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. The foundation on which the National Labor Relations Act rests is equalization of the bargaining power of employers and employees. The so-called 'Wisconsin Employment Peace Act' removes the principle of equalization and again reinvests in employers powers far in excess of those possessed by employers before the passage of any labor relations act in this country."

It is further asserted on pages 6 and 7 as follows:

> "This case is one in which the validity of the statutes of the State of Wisconsin, towit, Sections 111.01 through 111.19, Wisconsin Statutes, 1939, particularly Section 111.06 (2) (e) thereof, and an order and enforcing judgment based thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the

equal protection of the laws, and more particularly, denying to the petitioners freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute and order."

It will be seen from the able and exhaustive decision of the Circuit Court of Milwaukee County (C 12-47 inclusive) that many questions were presented to that court. However, upon appeal to the Supreme Court the petitioners for certiorari herein abandoned all questions except that of the constitutionality of sec. 111.06 (2) (e) of the Act, and the point that the order deprives the union, its officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage guaranteed by the Fourteenth Amendment to the constitution of the United States and Article I of the State of Wisconsin.

Errors were assigned as set forth in Footnote 2, page 8 of the petition. None of the Board's findings of fact were challenged. They could not be seriously challenged. Nor was any question raised as to the constitutionality of the Act as a whole. The petitioners for the writ herein directed their sole attack upon the constitutionality of sec. 111.06 (2) (e) of the Act. This is specifically pointed out by the Supreme Court at least twice in the opinion (R 53, 70, 71). The constitutionality of the Act as a whole was not before the Wisconsin Supreme Court in this case and accordingly is not before this court.

The Act as a whole (not the constitutionality of it) is before this court upon this petition only because other relevant sections of the Act must be given full force and effect in determining whether any substantial federal question is presented by the petition for the writ.

V.

POSITION OF THE BOARD WITH RESPECT TO JURISDICTION

It is the Board's position that the case presents no substantial federal question. The case is brought to this court on the ground that it involves a justiciable controversy under sec. 237 (b) of the Act of Congress dated February 13, 1935 (28 U. S. C. A. 344 (b)') providing, inter alia, that this court has jurisdiction to review by certiorari the final judgment of the highest court of any state determining the validity of a state statute allegedly repugnant to any provision of the United States Constitution. The position of the respondent board in this respect is:

(1) That there is no substantial federal question involved;

(2) The assumed federal question is frivolous and devoid of merit because it rests on obviously false assumptions not appearing in the record, namely, merely peaceful picketing and "peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravating danger" (*American Federation of Labor v. Swing*, 312 U. S. —, 61 Sup. Ct. 568, 85 L. ed. 513 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 659 (1940); *Carlson v. California*, 310 U. S. 106, 84 L. ed. 668 (1940);

(3) The assumed federal question is further frivolous and devoid of merit because it is contrary to the established law settled by this court in the case of *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.*, 312 U. S. —, 61 Sup. Ct. 552, 85 L. ed. 497 (Adv. Op., 1941).

VI.

SUMMARY OF ARGUMENT

A. Summary analysis of Ch. 57, Laws of 1939 (The Employment Peace Act).

B. By the express language of sec. 111.15 of the Act, both the Board and the courts are prohibited from applying sec. 111.06 (2) (e) of the Act so as to invade the constitutional right of freedom of speech.

C. Within the rule of *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. --, 85 L. ed. 497, no substantial federal question is presented by the record in this case. The strike, from its inception, was set in a context of violation, force, intimidation, and coercion.

D. The obvious remedy of the petitioners for this writ, if they wished to engage in peaceful picketing at or near the Plankinton House or the Kilbourn Hotel was that of applying to the Circuit Court for Milwaukee County for a modification of the decree.

E. Answer to petitioners' argument in support of the petition.

1. Sec. 111.06 (2) (e) is not unconstitutional and void and of no effect whatsoever because it contravenes the guarantee of free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States.

2. Sec. 111.06 (2) (e) and the order based thereon do not deny equal protection of the laws for the reason that the statute does not embody reasonable classification.

3. The order is not more comprehensive than necessary and proper under the doctrine of the *Meadowmoor case*.[1]

A. Summary analysis of Ch. 57, Laws of 1939 (the Employment Peace Act)

The Act is narrowly drawn and permits both the Board and the courts to deal with each individual case upon the factual situation presented by that case. For purposes of opposing the granting of this writ it is unnecessary to argue extensively the purpose and scope of the Employment Peace Act, Ch. 111, Wisconsin Statutes (Appendix "B", Petitioners' brief) or, to analyze extensively the sincere legislative effort to balance the rights of all major interests involved in industrial strife. The purpose is set forth in the declaration of policy, sec. 111.01 of the Act. Sec. 111.01 (1) recognizes that there are three major interests involved in employment relations, namely: the public, the employee and the employer, all of which intrests are interrelated. The purpose and policy of the state is to protect and promote each of these interests with due regard to the situation and the rights of the others.

The Act, by sec. 111.01 (2) recognizes that industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services are promotive of all of these interests and that they are largely

[1]Petitioners' arguments are to the contrary upon all points.

dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.

The Act recognizes by sec. 111.01 (3) that negotiations of terms and conditions of work should result from voluntary agreement by the employer and employees; for purposes of such negotiations an employee has the right, "if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source."

Sec. 111.01 (4), in its declaration of policy provides:

> "(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> "While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act, by sec. 111.02, sets up comprehensive definitions for the purposes of administering the Act. The whole Act is based upon recognition of the principle of collective bargaining units and that of the majority rule within those units. This latter principle is the very foundation rock and principle upon which the collective bargaining structure is erected. Without recognition of such principle the entire structure of the collective bargaining system is without

foundation or base. The system necessarily results in the majority speaking for and binding minorities. This principle is explicit in the National Labor Relations Act and in the Railway Labor Act.

The Act, by sec. 111.06 (1), (a) to (l) inclusive, sets up employer unfair labor practices. The Act, by sec. 111.06 (2) (a) to (j) inclusive, sets up employee unfair labor practices and by sec. 111.06 (3) it is provided:

> "It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

The employee unfair labor practices, established by sec. 111.07 (6) (2), Stats., are, in the main, practices which are recognized as unlawful conduct in a labor dispute in all jurisdictions.

Sec. 111.03 provides for the Employment Relations Board (the administrative tribunal). Sec. 111.05 provides for representatives and elections to be conducted by the Board and sec. 111.05 (3) provides for a review of the Board's final certification of the results of such elections.

Sec. 111.07 provides for hearings before the Board and for the prevention of unfair labor practices. Sec. 111.07 (7) makes provision for the Board's petitioning the Circuit Courts of the state for enforcement of its orders. Sec. 111.07 (8) provides for an aggrieved party petitioning the Circuit Court for a review of a Board order. Sec. 111.10 and Sec. 1111.11 respectively, provide for arbitration and mediation.

B. By the express language of sec. 111.15 of the Act, both the Board and the courts are prohibited from applying sec. 111.06 (2) (e) of the Act so as to invade the constitutional right of freedom of speech.

The challenged section, sec. 111.06 (2) (e), reads as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> "* * *
>
> "(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

Sec. 111.15 provides as follows:

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

Sec. 111.06 (2) (e), the challenged section, is obviously grounded upon recognition of a principle which must be recognized as the base and foundation of the entire collective bargaining process, namely, that of majority rule within a collective bargaining unit.

Sec. 111.15 in turn, by express language, prohibits both the Board and the courts from applying this section, as well as any other section of the Act so as to invade the constitutional right of freedom of speech. The two sections must be read together. The Supreme Court of the State of Wisconsin specifically so held in its opinions.

The Board is enjoined by the express language of sec. 111.15 from applying the section so as to invade the constitutional right of freedom of speech. Under the circumstances, both the Board and the courts deal with conduct upon the basis of the factual situation presented in each particular case. The orders of the Board are adjusted to the particular facts of the particular case and it is the duty of both the Board and the courts to see that those orders are adjusted to the particular facts of the particular case, and that the order and enforcement decree so adjusted do not deny any constitutional right of freedom of speech. Both the Board and the courts "deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law." *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. —, 85 L. ed. 497, 499.

C. Within the rule of Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. —, 85 L. ed. 497, no substantial federal question is presented by the record in this case. The strike from its inception was set in a context of violation, force, fear, intimidation and coercion.

It is only necessary to advert to the conduct of the strike set forth on pages 13 to 19 of this brief. The brief of the petitioners attempts to minimize the force and violence which occurred. The record however, speaks for itself. The whole campaign was characterized both by repeated threats of violence and by actual violence and the preventing, by force, of delivery of products to the hotels. The campaign was directed by the officers of the union. The officers engaged in the violence themselves and the union provided counsel fees and paid the fines of the members on the picket line who were arrested for the acts of violence.

Throughout the strike the City of Milwaukee had stationed six police officers each day for the purpose of maintaining order. The entire campaign was characterized by force, violence, intimidation and coercion,—any means to gain the end.

The picketing engaged in was not a mere appeal to reason in any sense of the term. It was mass picketing with 75 or 80 pickets thrown about all the entrances to the hotels. The picketing was not only characterized by violence, force, coercion, intimidation and continual threats of same, but by booing, sneering, jeering and hooting at guests. Spitting at the manager and employees seems to

have been an accepted practice (C 158, 136, 141, 142; SC 19, 20).

As the Supreme Court well said in its opinion on motion for rehearing, 236 Wis. 329, at page 354:

> "The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

In *Thornhill v. State of Alabama*, 310 U. S. 88, 84 L. ed. 659, the court said:

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, *the peaceful character of their demeanor*, the nature of their dispute with an employer; or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute."

Furthermore, in the *Thornhill case* the court states:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *"

The court further says:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

The Circuit Court of Milwaukee County in its decision (C 20-21) specifically grounds the decision and the judgment enforcing the order of the Board upon the following proposition:

> "Each case must turn on its own circumstances. In the cases at bar, the Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the pickets was continuously threatening, or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of conduct employed were sufficient to warrant the Board's findings and conclusions."

Then again said opinion (C 44) the trial court stated:

> "* * * The record presents ample facts and circumstances to warrant the Board's further conclusion that the acts so found characterized the entire campaign from its inception and its order that, for those reasons, it should be terminated."

Furthermore, in the Supreme Court on motion for rehearing the appellants (petitioners herein) argued in their brief as follows:

"Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups."

In answer to this assertion the court stated as follows:

"What counsel refer to is their claim that the act which provides that what is denominated in the opinion 'an unauthorized strike,' that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion.

"Section 111.15 of the Employment Peace Act provides, among other things:

" 'Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*'

"The last sentence contained in the opinion is

'Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment.'

"It is explicitly stated in the opinion that the order of the board, the judgment of the circuit court affirming it, and the opinion of this court did not deal with anything approaching peaceful picketing. We pointed out—

" 'In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution.'

"How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in."

This decision was rendered upon January 7, 1941. The *Meadowmoor* decision in this court was rendered on January 18, 1941. It is perfectly apparent that that board in

applying the statute, the Circuit Court in applying the statute, and the Supreme Court of the state, in applying the statute, merely anticipated, and anticipated correctly, this court's holding in the *Meadowmoor case*.

D. The obvious remedy of the petitioners for this writ, if they wished to engage in peaceful picketing AT OR NEAR the Plankinton House or the Kilbourn Hotel (the only picketing which the order requires them to cease promoting or engaging in) is that of applying to the Circuit Court for Milwaukee County for a modification of the decree.

Section 111.07 (1) provides as follows:

> "Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This section is given the very widest scope by the Supreme Court in its opinion in this case (pp. 345, 347, 348, Wis. citation). The court in the exercise of its equitable power could modify the order of the board as enforced by the courts at any time upon showing made that any provision of the order as enforced is no longer warranted in that the coercive effect of the fears engendered by past violence, force, threats and other intimidating conduct has been cured through lapse of time as well as by bona fide change in attitudes. Upon such application the court could and unquestionably would give the widest possible scope to all consti-

tutional pronouncements in the *Meadowmoor, Swing, Carlson, Thornhill* and all other cases of like tenor or import.

It will be seen from the opinion of the trial court (C. 12-47) that that court held "advertising the facts of a labor dispute" to be freedom of speech entitled to constitutional protection considerably before this court decided the Carlson and Thornhill cases. The petitioners herein do not choose to avail themselves of that perfectly obvious remedy but on the contrary ask this court to take jurisdiction by certiorari on arguments all of which are predicated upon the proposition that the courts of the state of Wisconsin are not competent to construe their own statutes and that sec. 111.06 (2) (e) of the Act must be construed as the petitioners claim it must be construed (and this in spite of the fact that the Supreme Court of the State has said it cannot be so construed and has refused to so construe it) and in total disregard of sec. 111.15 which prevents both the Board and the courts from applying the section in a manner so as to infringe any constitutional right of freedom of speech.

E. Answer to petitioners' argument in support of the petition

1. Sec. 111.06 (2)(e) is not unconstitutional and void and of no effect whatsoever because it contravenes the guarantee of free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States.

The argument contra completely ignores the construction placed upon sec. 111.06 (2) (e) by the Supreme Court of the state as well as sec. 111.15, Stats., which prohibits

both the Board and the courts from applying the section so as to contravene the guarantees of free speech.

The petitioners state (page 15 of the brief):

> "The first question presented for consideration is whether Section 111.06 (2) (e), prohibiting peaceful picketing in connection with a strike where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment."

Doubt is conceded as to whether any such issue is presented by the particular facts of the case. Obviously no such issue is presented. As the Supreme Court said in its opinion (R 71):

> "The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

See also the language quoted from said opinion, pages 31-32 of this brief.

The Supreme Court of the State of Wisconsin specifically held that sec. 111.06 (2) (e), when read in the light of sec. 111.15 could not be applied by the board so as to prohibit peaceful picketing as described in the *Thornhill* case.

The only question before the court was whether the statute and order of the Board violated any constitutional right of the petitioners herein under the Fourteenth Amendment (freedom of speech and equal protection of the laws).

That question has to be determined, not only in the light of sec. 111.06 (2) (e), but also in the light of sec. 111.15, Stats., which prevents both the Board and the Courts from applying the section so as to violate any constitutional right of freedom of speech.

In construing the statute both in the original opinion and in the opinion for rehearing, the court pointed out:

> "In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

The case on its factual situation in no sense presented a case in which a minority was ordered to cease and desist from peaceful picketing merely because they were a minority. They were ordered to cease and desist from picketing because of the conduct they engaged in, repeated acts of violence, threats, intimidation, and coercion,—a campaign characterized by lawlessness throughout. Petitioners so circumstanced are in no position to raise any question respecting the right to peacefully picket or the right to free speech. The order was adjusted to the conduct engaged in and upon the particular factual situation of the case.

The petitioners seek to inject the right of minorities to peacefully picket in the case (1) because the Board predicated its order upon sec. 111.06 (2) (e), (2) because the Circuit Court did not rely upon violence, and (3) because the Supreme Court did not base its opinion upon violence.

In the first place the Board's findings of fact, 19 to 27, (C 257-259 inclusive) are all directed to the violent method in which the campaign was conducted and the union's perfectly obvious connection therewith. It is obviously a rather far fetched argument to urge that the Board did not consider the element of violence, force, coercion, and intimidation which characterized the campaign in framing its order.

In any event the question before the Circuit Court as well as before the Supreme Court of the state was whether the order of the Board under the facts of the case did contravene any constitutional provision of free speech.

As to the second point that the decision of the Circuit Court of Milwaukee County was based upon the failure of the petitioners to comply with sec. 111.06 (2) (e), Stats.; as has already been pointed out[1], the Circuit Court grounded its decision upon the Board's findings of facts which characterized the entire campaign from its inception as one of justifying the Board in "concluding that the violent methods, assaults, or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was continuously threatening, or that threatening conduct

[1]See p. 30 of this brief.

would be resorted to should conditions be favorable for the purpose" * * * "and its order that, for those reasons, it should be terminated."

As to the third point, the Supreme Court, both in its original decision and in its decision on motion for rehearing, did emphasize, and in unmistakable language, the violence, force, coercion and intimidating conduct which characterized the whole campaign (see quotation from the decision, page 29 of this brief).

The case does not present any question as to what a peaceful minority may do in carrying on an unauthorized strike under sec. 111.06 (2) (e), Stats. As was stated by the court in its opinion for rehearing:

> "We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the Thornhill case, peaceful picketing. We may say this, however, that the statute does not authorize the majority group, even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises."

Petitioners urge (page 2 of their brief), in presenting their argument, that sec. 111.06 (2) should be construed upon its face. That, of course, is obviously untrue. It must be read in the light of sec. 111.15, Stats., which specifically

prohibits both the Board and the courts from applying the section in any manner so as to invade unlawfully the constitutional right of freedom of speech.

Petitioners keep urging throughout the argument that minority groups cannot be deprived of the right of freedom of speech just because they are minorities. Why the argument is considered apropos is not readily perceivable. The Supreme Court of the state has specifically said that minorities are not to be deprived of the right of freedom of speech just because they are minorities.

2. Sec. 111.06 (2) (e) and the order based thereon do not deny equal protection of the laws for the reason that the statute does not embody reasonable classification.

The argument contra upon this point of the case is presented on pages 24-28 of the petitioners' brief. The only point made seems to be that the minority has the right to peacefully picket just as much as the majority. Since the court has held that sec. 111.06 (2) (e) shall not be construed or applied so as to deny the constitutional right of freedom of speech[1], the point raised is without merit and is undistinguishable from the other point that the statute violates the constitutional right of freedom of speech.

The argument is further predicated upon the fact that a majority group would not have had to answer to the Board for the conduct engaged in in the instant case. A majority group would have had to answer to the board for the conduct engaged in.

It is urged that an obvious defect in such classification is in indefiniteness as to numbers. The point is wholly without substance and does not seem to be related to any

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[1]The court says, p. 35: "Par. (e) as construed, does not prohibit, as described in The Thornhill case, peaceful picketing."

point other than the point of peacefully picketing. That point has been fully covered.

Furthermore, as stated by the Supreme Court, the principle of majority rule within a collective bargaining unit is fundamental in the attempt of the legislature and of congress to regulate labor relations. The principle upon which authorized collective bargaining depends is that the rule of the majority within a collective bargaining unit shall bind the minority. Any infirmity in classification here is inherent in the classification in both the National Labor Relations and the Railway Labor Peace Act. (See opinion of the court, 236 Wis. 329, p. 346 (Adv. Sheet)).

As the classification is attacked only in relation to denial of the right of minorities to peacefully picket and as the court has specifically held that the statute is not to be so construed, as to deny to minorities such right[1], the petitioners obviously raise no new point not covered by their point "A" (petitioners' brief, pp. 17-24).

The petitioners are obviously in no position in this court to challenge the validity of the classification for purposes of determining what a peaceful minority may do in carrying on an unauthorized strike. They were not a peaceful minority. The case did not present any such question to the Supreme Court and of course presents no such question to this court. No principle of law is more firmly established than that no litigant can be the champion of constitutional rights except to the extent that his own rights are affected.

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[1]See quotations from the decision, p. 38 of this brief.

Lehon v. Atlanta, 242 U. S. 53, 56, 61 L. ed. 145;

Bandini Petroleum Co. v. Superior Court (1931), 284 U. S. 8, 76 L. ed. 136-145;

Southern Petroleum Co. v. King (1910) 217 U. S. 524, 534, 54 L. ed. 868.

As stated by Justice Cardozo in *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814:

"* * * The plaintiffs are not champions of any rights except their own." (p. 583)

3. The order is not more comprehensive than necessary and proper under the doctrine of the Meadowmoor case.

The order deals with a particular factual situation. It is by no means as broad or comprehensive in scope as the injunction dealt with in the *Meadowmoor* case. The order provides that the unions, the officers, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid; and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

The prohibition of picketing is confined to *at or near* the Plankinton House or the Kilbourn Hotel. The order does not purport to "prevent peaceful picketing" at any other place except "at or near the Plankinton House or the Kilbourn Hotel," the vicinity in which the campaign characterized by violence, force, threats, intimidation, et cetera.

Petitioners state (page 35 of their brief):

"In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against 'boycotting in any way the Plankinton House Company' is as all-inclusive and general an interdiction as could be imagined."

The criticism of the picketing provisions of the order is obviously without merit for the reasons immediately

above pointed out. Petitioners apparently urge that the boycotting provision of the order prohibits communication by letter, radio, newspaper, etc., concerning the facts of a labor dispute. The order cannot be so construed. The Supreme Court specifically repudiated any such contention in both the original opinion and in the motion for rehearing. The term "boycott" involves intimidating and coercive factors not involved in the mere publicizing of the facts involved in a labor dispute (freedom of speech).

Throughout the brief petitioners treat picketing and boycotting as synonymous terms. They have never been so treated. See Oakes' *Organized Labor and Industrial Conflicts*, p. 603 et seq.

At page 35 of the petitioners' brief it is stated:

> "We have pointed out that there is now pending in the Circuit Court for Milwaukee County a proceeding in which it is sought to hold the entire labor movement of the State of Wisconsin in contempt of court because of the writing of letters and making of public statements concerning the controversy at the Plankinton House."

A statement of similar import outside the record is presented on page 29 of petitioners' brief.

There is seldom excuse for presenting matters outside of the record. In a particular case when counsel does indulge in such luxury, it would seem only fair to expect that the matters outside the record be presented accurately. The statements made are in no sense accurate statements. The subsquent contempt proceedings which were instituted and which are not here involved presented all phases of the

petitioners' activities and those associated with them from the time of the rendition of the judgment of the Circuit Court to the date of the petition for contempt. We shall not argue that case here. Suffice it to state that the case involved many questions of law and fact. That case involved not only a contemptuous refusal to abide by the judgments of the courts of the state but all phases of the petitioners' activities and those associated with them. These activities were a far cry from the publicizing of the facts of a labor dispute. They were a far cry from the free competition of ideas in the open market of ideas entitled to constitutional protection. That case will be argued if and when it comes here. The instant case presents no substantial federal question.

We have checked our brief in the contempt proceeding and find no place in the brief where we ever took any such position, nor do we recall taking any such position in oral argument. So far as boycotting is concerned, the record in the contempt case presented in detail all coercive and intimidating factors, all force factors which would take the activities of the petitioners and their associates out of the field of peaceful persuasion and place them in the field of force (coercion).

CONCLUSION

For the foregoing reasons it is submitted that no federal question in substance is presented and that the writ of certiorari prayed for should be denied.

Respectfully submitted,

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